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June 5, 2000

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Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Second Application by BellSouth Corporation, BellSouth
Telecommunications, Inc., and BellSouth Long Distance, Inc., for
Provision of In-Region, InterLATA Services in Louisiana*
CC Docket No. 98-121

Dear Ms. Salas:

Attached for filing are an original and four copies of BellSouth's Opposition to Motion of AT&T Corp. for Expedited Decision on Petition for Reconsideration. Please let me know if you have any questions about this matter.

Sincerely,



Austin C. Schlick

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN - 5 2000
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OFFICE OF THE SECRETARY

In the Matter of

Second Application by BellSouth Corporation,
BellSouth Telecommunications, Inc., and
BellSouth Long Distance, Inc., for Provision of
In-Region, InterLATA Services in Louisiana

CC Docket No. 98-121

To: The Commission

**BELLSOUTH'S OPPOSITION TO MOTION OF AT&T CORP.
FOR EXPEDITED DECISION ON PETITION FOR RECONSIDERATION**

BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively "BellSouth") hereby oppose AT&T's motion for expedited decision on its pending petition for reconsideration.

The ostensible basis for AT&T's motion is its claim that Bell Atlantic is currently violating the Commission's rules on inbound telemarketing in New York. The claim will be resolved by the Commission if AT&T brings a complaint against Bell Atlantic. Whatever the decision there, it has no bearing on the underlying validity of the Commission's rules on joint marketing, as carefully articulated and defended in the Non-Accounting Safeguards Order, the South Carolina Order, the New York Order, and the Second Louisiana Order at issue here.¹

¹ First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905 (1996) ("Non-Accounting Safeguards Order"), modified on recon., 12 FCC Rcd 2297(1997), further recon., 12 FCC Rcd 8653 (1997), petitions for review denied sub nom. Bell Atlantic Tel. Cos. v. FCC, 131 F.3d 1044 (D.C. Cir. 1997); Memorandum Opinion and Order, Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South

AT&T makes no new arguments on the merits of the Commission's joint marketing rules. It simply repeats the same arguments that the Commission has repeatedly and properly rejected, and that AT&T is simultaneously making to the U.S. Court of Appeals in its challenge to the New York Order. BellSouth has already responded in detail to those arguments in its opposition to AT&T's petition for reconsideration. They have not improved with age. Indeed, the statutory claim that is the sole basis for AT&T's disagreement with the Commission is completely insubstantial. Not only does section 251(g) not forbid inbound telemarketing by the BOCs, but section 272(g), as properly interpreted by the Commission, expressly permits such joint marketing – the same joint marketing that is available to AT&T and to any other provider offering one-stop shopping to consumers. Joint marketing of this sort is both efficient and pro-competitive.

This Commission should accordingly reject AT&T's motion, and its underlying petition, for what they are – efforts to advance the dominant long distance carrier's self-interest at the expense of both the law and the public interest.

DISCUSSION

Section 251(g) continues a BOC's pre-existing MFJ obligation to provide equal access. The 1996 Act, however, also authorizes the BOCs and their section 272 affiliates to market services jointly upon receiving interLATA relief under section 271. 47 U.S.C. § 272(g)(2). In the Non-Accounting Safeguards Order, the Commission struck a balance between these

Carolina, 13 FCC Rcd 539 (1997) ("South Carolina Order"); Memorandum Opinion and Order, Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, 15 FCC Rcd 3953 (1999) ("New York Order"); Memorandum Opinion and Order, Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd 20599 (1998) ("Second Louisiana Order").

provisions, a balance that it maintained and further refined in the South Carolina Order and the Second Louisiana Order. The Commission explained that “the continuing obligation to advise new customers of other interLATA options is not incompatible with the BOCs’ right to market and sell the services of their section 272 affiliates under section 272(g),” 11 FCC Rcd at 22047, ¶ 292. Rather, a BOC can meet its equal access obligations in the joint marketing context by “inform[ing] new local exchange customers of their right to select the interLATA carrier of their choice and tak[ing] the customer’s order for the interLATA carrier the customer selects.” Id. at 22046, ¶ 292.

In the South Carolina Order, the Commission specifically concluded that “a BOC, during an inbound telephone call, should be allowed to recommend its own long distance affiliate, as long as it contemporaneously states that other carriers also provide long distance service and offers to read a list of all available interexchange carriers in random order.” 13 FCC Rcd at 670, ¶ 237. In this way, the Commission was able to “harmonize the existing equal access requirements with [a BOC’s] right under the Act to engage in joint marketing.” Id. at 671, ¶ 238. The Commission reiterated this same position in the Second Louisiana Order, stressing that “BellSouth’s provision of accurate information to consumers upon request about the services available to them is a form of acceptable joint marketing.” Id. at 20805, ¶ 358.

This balanced approach makes sense. Any requirement that a BOC’s long distance affiliate be mentioned only as part of a random list would nullify the BOC’s statutory joint marketing right. Moreover, requiring a BOC to list every interexchange carrier even when the customer (after 16 years of equal access and exposure to numerous carriers’ marketing efforts) has indicated that she does not want to hear the list, would impose a needlessly burdensome obligation that would slow the presubscription process and annoy the BOC’s local customers.

Such a requirement also would be flatly inconsistent with the Commission's recognition that section 251(g) does not add to a BOC's pre-existing equal access obligations and that, under section 272(g), a BOC must be permitted to market the services of its long distance affiliate. Non-Accounting Safeguards Order, 11 FCC Rcd at 22046, ¶ 292. If the statute's express joint marketing authorization is to retain any meaning, a BOC cannot be denied the opportunity to bring its affiliate's services to the customer's attention in a preferential fashion.²

In its petition for reconsideration, AT&T asked this Commission yet again to limit the ability of the BOCs to engage in joint marketing, while conceding that the Commission has already rejected this argument in the Second Louisiana Order, the South Carolina Order, and the New York Order. AT&T Pet. at 9-15. AT&T's sole argument – then and now – is that a BOC's recommendation of its long distance service at the outset of inbound calls for new service violates pre-1996 equal access requirements. Id. at 11-12. But as the Commission has previously pointed out, “the equal access obligations requiring BOCs to provide the names and telephone numbers of interexchange carriers in random order were written at a time when BOCs could not provide (and therefore could not market) long distance service.” South Carolina Order, 13 FCC Rcd at 671, ¶ 238. This requirement therefore cannot be used to trump a BOC's right to engage in joint marketing during inbound calls, which Congress, fully aware of equal access requirements (see 47 U.S.C. § 251(g)), granted in section 272(g).³

² See Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 562 (1990) (“Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.”); see also Weinberger v. Hynson, Westscott & Dunning, Inc., 412 U.S. 609, 631-32 (1973) (“[i]t is well established that our task in interpreting separate provisions of a single Act is to give the Act ‘the most harmonious, comprehensive meaning possible’”).

³ Even looking solely at the terms of section 251(g), AT&T is plainly mistaken in suggesting that a formal rulemaking is required before the FCC can adjust prior equal access requirements to

AT&T believes that a BOC's joint marketing rights should not include any form of inbound telemarketing. AT&T Pet. at 14-15. But "section 272(g) confers upon BOCs authority to market and sell services of their long distance affiliates, and does not contain any exception for inbound calls or calls from new customers." South Carolina Order, 13 FCC Rcd at 671-72, ¶ 239. The conclusion is accordingly inescapable that "BOCs are permitted under the statute to market their long distance affiliates' services during inbound calls." Id. at 672, ¶ 239. The absence of limitations on inbound joint marketing in section 272(g) was obviously deliberate and considered, for elsewhere in the 1996 Act Congress set out express restrictions on such marketing. See, e.g., 47 U.S.C. § 274(c)(2)(A) (limiting BOCs to inbound telemarketing or referral services related to the provision of electronic publishing).⁴

take into account BOC entry into long distance. As AT&T itself admits (Pet. at 8 n.12), "an agency ordinarily has discretion to proceed by rulemaking or adjudication." See, e.g., SEC v. Chenery, 332 U.S. 194, 202-03 (1947). AT&T's supposed authority here, Perales v. Sullivan, 948 F.2d 1348 (2d. Cir. 1991), is not to the contrary. See AT&T Pet. at 11. Perales was "essentially a reaffirmation of the well-settled rule that an administrative agency must give prior notice of its intention to enact substantive regulations." 948 F.2d at 1358. Indeed, the Second Circuit expressly noted that an agency may give notice of a proposed change in substantive regulations in a variety of ways, including case-by-case adjudication. Id. at 1354. Accordingly, an articulation of the regulations governing joint marketing in the context of ruling on a 271 application was within the discretion of the FCC, and nothing in section 251(g) – which speaks only of new "regulations," not of a formal rulemaking – is to the contrary. Beyond this, as explained above, the FCC first announced its policy governing joint marketing in the Non-Accounting Safeguards Order, which was unquestionably a formal rulemaking. The FCC's subsequent 271 orders merely applied and refined the principles announced in that rulemaking.

⁴ Any restrictions on joint marketing would raise First Amendment concerns as well. The Commission may not restrict a BOC's ability to disclose "truthful, verifiable, and nonmisleading factual information" about its long distance affiliate's offerings absent a "substantial" government interest that reasonably "fit[s]" the Commission's restriction. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416 (1993). Because AT&T's approach to presubscription would deprive the BOCs of a statutory right to engage in joint marketing that Congress granted the Bell companies after full deliberations, it fails both prongs of this test.

AT&T offers no new argument to refute these fundamental points. Nor does AT&T attempt to explain why it would be appropriate for the Commission to address in a reconsideration proceeding the same legal arguments that are currently pending (and rebutted by the Commission) in AT&T's own appeal of the New York Order to the D.C. Circuit. See Brief for Appellee at 42-44, AT&T Corp. v. FCC, No. 99-1538 (D.C. Cir. argued Apr. 24, 2000). AT&T instead contends that Bell Atlantic's performance in New York has given new urgency to its claim that the BOCs should be denied any form of inbound telemarketing. What AT&T really means is that its dominant market share in New York has been "declining precipitously" (Declaration of Robert Aquilina ¶ 7) as a result of the new competition injected by Bell Atlantic. But that is precisely what is supposed to happen. The Commission repeatedly has found that "competition [in long distance markets] will increase further if and when regional Bell Operating Companies are permitted to enter these markets."⁵

AT&T suggests that Bell Atlantic may have violated the Commission's rules on inbound telemarketing, and AT&T has accordingly threatened to file a complaint against Bell Atlantic with the Commission. This highlights that Bell Atlantic's marketing in New York is not a proper basis for reconsideration here. Indeed, in its Second Louisiana Order, the Commission expressly

⁵ Memorandum Opinion and Order, Application of 360° Communications Co., Transferor, and ALLTEL Corp., Transferee, For Consent to Transfer Control of 360° Communications Co. and Affiliates, 14 FCC Rcd 2005, 2017, ¶ 26 (1998); see also Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, 12 FCC Rcd 20543, 20741-42, ¶ 381 (1997) ("BOC entry into the long distance market will further Congress' objectives of promoting competition and deregulation of telecommunication markets."); Memorandum Opinion and Order, Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, 15 FCC Rcd 3953, 4164, ¶ 428 (1999) ("[T]he record confirms our view that BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist.").

noted that if a BOC should “misrepresent [its long distance] services or mislead consumers with false information, interexchange carriers have alternative methods of seeking recourse through the Commission and through private litigation.” 13 FCC Rcd at 20805, ¶ 358. That process should be allowed to take its course. The fact remains that Congress allowed the BOCs to engage in joint marketing, including inbound telemarketing.

AT&T suggests that a “bright line” rule is necessary to prevent abuses in inbound telemarketing. But the only “bright line” rule that AT&T suggests is a flat-out prohibition, and that is illegal and unfair for all the reasons that the Commission has already given. The pending complaint proceeding will give the Commission an additional opportunity, if necessary, to clarify the obligations of the BOCs in providing inbound telemarketing under the Commission’s settled approach. It provides no occasion, and there is no justification, for altogether banning such inbound telemarketing.

CONCLUSION

AT&T’s contention that Bell Atlantic is in violation of the Commission’s rules governing joint marketing has no bearing on the pending petition for reconsideration and provides no occasion for changing those rules. AT&T has not raised any substantive argument concerning joint marketing that the Commission has not already twice rejected. AT&T’s suggestion that inbound telemarketing is forbidden by section 251(g) has no basis in that provision, and runs directly contrary to the express authorization for joint marketing contained in sections 272(g)(2) and 272(g)(3). AT&T is simply seeking an unjustified competitive advantage by denying the BOCs the efficiencies of joint marketing that Congress expressly allowed. Both AT&T’s motion, and its underlying petition, should be denied.

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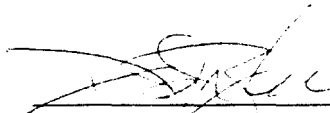
A handwritten signature in black ink, appearing to read "Austin C. Schlick", written over a horizontal line.

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June 5, 2000

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of June 2000, I caused copies of BellSouth's Opposition to Motion of AT&T Corp. for Expedited Decision on Pending Petition for Reconsideration to be served upon all parties on the attached service list by first-class mail, postage prepaid, or by hand (designated with an asterisk).



David M. Burke

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